

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SHARON NEAL,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN
SERVICES,
Agency.

DOCKET NUMBER
HQ71218910035

DATE: AUG 17 1990

William P. McKillen, American Federation of Government
Employees, Greendale, Wisconsin, for the appellant.

Hoyt C. Griffin, Jr., Chicago, Illinois, for the agency.

BEFORE

Daniel R. Levinson, Chairman
Maria L. Johnson, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

The appellant has requested review of a May 30, 1989 arbitration decision that sustained the agency's action removing her from the position of Claims Development Clerk based on unacceptable performance. In its response to the appellant's request, the agency asserts that the Board lacks jurisdiction to review the arbitration award because the appellant has not raised a claim of discrimination under 5 U.S.C. § 2302(b)(1). Because it appeared that the Board lacks jurisdiction over the matter appealed, the Clerk of the

Board issued an order on June 6, 1990, providing the appellant with an opportunity to clarify her claims of disparate treatment and discrimination.

The appellant has responded to the Board's order, and the agency has replied to the appellant's response. For the reasons set forth below, we DISMISS the appellant's request for review of the arbitration award for lack of jurisdiction.

ANALYSIS

As explained in the order, the Board may review an arbitration award under 5 U.S.C. § 7121(d) only if the employee has been affected by a prohibited personnel practice under 5 U.S.C. § 2302(b)(1) and the action is otherwise appealable under 5 U.S.C. § 7702. See *Salinas v. Immigration and Naturalization Service*, 34 M.S.P.R. 553, 554 (1987), *aff'd*, 846 F.2d 77 (Fed. Cir. 1988) (Table). As further stated, the appellant has the burden of proving by preponderant evidence that the Board has jurisdiction to hear the case. See 5 C.F.R. § 1201.56(a)(2)(i).

In her request for Board review of the arbitration award, the appellant does not raise a claim of prohibited discrimination, nor does she raise the arbitrator's failure to make a specific finding on her claim of disparate treatment. Appeal File, Tab 3, Appellant's Brief. Similarly, in her response to the Board's order, the appellant has failed to identify any discrimination of the type prohibited by 5 U.S.C. § 2302(b)(1). Rather, she simply asserts that "the record as

a whole" shows "disparate treatment/discrimination" and that the agency "discriminated" against her in creating the performance standards for her position.

Based upon our review of the record, we find that the appellant's bare allegations of disparate treatment and discrimination before both the arbitrator and the Board, without specific reference to any of the protected categories under 5 U.S.C. § 2302(b)(1), fail to establish the Board's jurisdiction to review the arbitration award under 5 U.S.C. § 7121(d). Compare, e.g., *Ogden Air Logistics Center v. American Federation of Government Employees*, 6 M.S.P.R. 630, 635-36 (1981) (mere assertion that the agency's action violated 5 U.S.C. § 2302(b) is insufficient to establish the Board's jurisdiction under 5 U.S.C. § 7121(d)), with *McClain v. Department of the Air Force*, 37 M.S.P.R. 653, 655 (1988) (the Board has jurisdiction to review an arbitration award under 5 U.S.C. § 7121(d) where the appellant asserted the prohibited personnel practice of handicap discrimination based on alcohol abuse and the removal action could have been appealed to the Board under 5 U.S.C. Chapter 75).

We also find that the appellant's reference to provisions in 5 U.S.C. § 2301(b) does not establish a basis for the Board to take jurisdiction over this appeal. The merit systems principles are intended to furnish guidance to Federal agencies and do not constitute an independent basis for legal action. See *Middleton v. Department of Justice*, 23 M.S.P.R. 223, 227 n.6 (1984), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985)

(Table); *Wells v. Harris*, 1 M.S.P.R. 208, 214-15 (1979). Accordingly, the appellant's citation to the merit systems principles does not establish a cause of action.

ORDER

This is the final order of the Merit Systems Protection Board in this appeal.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.


for Robert E. Taylor
Clerk of the Board